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No. 56625-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

RAJVIR PANAG, on behalf of herself and all others similarly situated,

Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurance company, and CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection Services,

Appellants.

FARMERS INSURANCE COMPANY'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss Ms. Panag's Consumer Protection Act ("CPA") claim against Farmers under CR 12(b)(6).

2. The trial court errred in granting Ms. Panag's request for discovery after dismissing all of her claims as a matter of law.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether collection activities that are neither "false, deceptive or misleading" as a matter of law under the Fair Debt Collection Practices Act ("FDCPA") can be "unfair or deceptive" under the CPA?

2. Whether the trial court has jurisdiction to order Defendants to produce additional discovery after dismissing all of the sole plaintiff's claims as a matter of law?

III. STATEMENT OF THE CASE

A. Facts

On October 5, 2003, Ms. Panag was in an automobile accident[4] with Mr. Hamilton. Ms. Panag was uninsured. Mr.

Hamilton was insured by Farmers. CP 3 ¶¶ 7-8; CP 478-481. Farmers' investigation determined that Ms. Panag was 40 percent at fault and Hamilton was 60 percent at fault. CP 486. Farmers paid Hamilton $6,442.53 for damage to his car, and became subrogated to Hamilton's claim against Ms. Panag for 40 percent of that amount. *See* CP 486. If Ms. Panag had been insured (as required by Washington law), Farmers' subrogation claim would have been settled with her insurer. Because Ms. Panag was uninsured, Farmers had to pursue its subrogation claim directly against her.

Farmers referred its subrogation claim to Credit Control Services, Inc. ("CCS") for collection. The contract between Farmers and CCS states, in relevant part:

> CCS will attempt to recover subrogation claims of Farmers that Farmers at its sole discretion chooses to refer to CCS, and CCS shall utilize reasonable efforts consistent with industry standards, in a commercially reasonable manner and ***in compliance with all applicable laws,*** to recover subrogation claims referred by Farmers from parties believed by Farmers to be responsible for those claims (hereinafter referred to as "Responsible Parties").

CP 496-497 ¶ 11(a) (emphasis added). In November of 2003, CCS sent Ms. Panag a letter stating that she owed an "amount due" of

$6,442.53. CP 3 ¶ 13. The letter states that the $6,442.53 represented a "subrogation claim" of Farmers, CCS's client. CP 168. The letter invited Ms. Panag to provide CCS with "evidence of [her] insurance coverage that existed on the date of loss" or, in the alternative, to remit payment via CCS's 24-hour toll-free line or by accessing its website. CP 168. CCS sent Ms. Panag additional correspondence regarding Farmers' subrogation claim on December 1, 10, and 22, 2003. CP 5 ¶ 26; CP 6 ¶¶ 32 & 33.

Ms. Panag made no payments to Farmers or CCS. She admitted that while she had an emotional reaction to these letters, she did not experience any physical symptoms or require medical attention. CP 470-471. The only expenses she incurred following receipt of the notices from CCS were: (1) $.37 postage of a letter to her attorney, whom she had previously retained to assist with matters related to the accident, enclosing the CCS notice, (2) parking at the attorney's office, and (3) $ 9, after filing the Complaint, to obtain a copy of the credit report to determine whether Farmers or CCS reported any adverse credit information on her credit report. Neither made any negative report, CP 474-477.

B. Procedural History

On May 19, 2003, Ms. Panag filed a purported class action complaint against CCS and Farmers claiming that the November and December correspondence letter from CCS violated the Fair Debt Collection Practices Act ("FDCPA"), the CPA, and resulted in the Defendants being unjustly enriched. *See* CP 134-136, ¶¶ 12-27. Ms. Panag alleged that the November letter "did not include language mandated by Section 1692g" or by " Section 1692e" of the FDCPA. CP 134-135, ¶¶ 12-13,17; CP 141, ¶¶ 50-57. Ms. Panag also complained that Defendants improperly sought to collect an "Amount Due," $6,442.53, which had not been reduced to judgment and therefore was not a "debt" within the meaning of the FDCPA. CP 136 ¶ 24; CP 141 ¶ 52. This conduct, Ms. Panag claimed, constituted "unfair and deceptive acts" that violated the CPA and caused the Defendants to be unjustly enriched. CP 139-141, ¶¶ 40-49; CP 142, ¶¶ 58-60.

On June 21, 2003, Ms. Panag filed an amended complaint that contained extensive references to the FDCPA but sought damages only for unjust enrichment and violations of the CPA. *See* CP 1-13.

Plaintiff again claimed that "the alleged debt that Farmers, through CCS, asserts as an amount 'DUE' was – and remains – merely an unliquidated, potential tort claim." CP 3 ¶ 14. Therefore, Ms. Panag claimed, " the claimed amount 'DUE' was not a 'debt' nor subject to 'collection.'" CP 4 ¶ 21. *See also* CP 4 ¶ 22; CP 7 ¶ 36 (claiming that the alleged "amount due" had not been reduced to judgment and was, "at best, a potential, unliquidated tort claim based on a subrogated interest from its insured."); *see also* CP 3-6 ¶¶ 13-17, 20-23, 25, 27-29, 34 (describing allegedly improper attempts to collect an "amount due"). Once again, Ms. Panag alleged that CCS's attempt to collect Farmers' subrogated debt constituted unfair or deceptive acts in violation of the CPA and caused Defendants to be unjustly enriched. CP 10-11 ¶¶ 52 – 64.

On August 3, 2004, Farmers moved to dismiss Ms. Panag's complaint for failure to state a claim against it. Farmers argued, in part, that the FDCPA provided remedies only against ***collection agencies*** but not against ***creditors*** such as Farmers. *See generally* CP 157-171. The FDCPA's state equivalent, the Collection Agency Act ("CAA"), similarly provides only a limited private right of

action against collection agencies; because Farmers was not a "collection agency" under the CAA, Ms. Panag could not state a claim for relief under the CAA. CP 162-163.

Farmers argued that Ms. Panag could not obtain a different result under the CPA. When specific federal and state statutes address a regulated activity (collection of debts), and when the subrogated insurer does exactly what these statutes allow (hires a collection agency to collect amounts owed), the plaintiff is not free to second-guess or redefine the basic notions underlying these statutes (*e.g.,* what is debt, or when the debt is "due") under the guise of complaining of "unfair or deceptive" practices under the CPA. CP 164. Finally, Farmers argued that Ms. Panag's claim for unjust enrichment failed because she never made any payments and therefore Farmers could not possibly be enriched by retaining her money or property. CP 165.

On August 23, 2004, the trial court granted Farmers' motion, in part. CP 238-239. The court dismissed Ms. Panag's claims, if any, under FDCPA, as well as the claim that a violation of the FDCPA or the CAA was a *per se* violation of the CPA. The court

also dismissed Ms. Panag's claim for unjust enrichment. *Id.* The court made "no ruling whether the practices [complained of by Ms. Panag] were unfair or deceptive." *Id.* Neither did it rule on "any claims as to CCS, Inc." *Id.*

After answering Ms. Panag's amended complaint and taking her deposition, Farmers moved for summary judgment on Ms. Panag's remaining CPA claim. CP 426-449, 450-497. Farmers again argued that the CPA could not be used as an end-run around the FDCPA and CAA, to prohibit subrogated insurers to do what the specific statutes that regulate collection practices allow. CP 437-438. In addition, Farmers argued because Ms. Panag suffered no injury to her property or business as a result of the alleged improper notices, she failed to establish a cognizable CPA claim. CP 441-443.

The trial court again did not address whether a practice that comports with the FDCPA and/or the CAA can nevertheless be construed as "unfair or deceptive" under the CPA. The court agreed, however, that Ms. Panag had not suffered any legally cognizable injury and therefore had no claim under the CPA or any other legal

theory. RP at 37-38. Nonetheless, the trial court delayed entering the order on summary judgment dismissing Ms. Panag's case by one week in order to give her attorneys an opportunity to amend the complaint by adding another plaintiff with an actionable injury. RP at 38-39. Specifically, the trial court stated:

> [A]s to Ms. Panag, I am making a ruling that as a matter of law ... what you are terming the injuries that she suffered, the monies that she expended in order to answer her own questions in response to these notices . . . do not satisfy the fourth and fifth elements of the Consumer Protection Act under *Hangman Ridge*.
>
> So, do you want some additional time? I don't know whether there is such a person out there that you know about that . . . you wish to substitute in order to have the case go forward. . . . Otherwise, I'll just sign the . . . motion that grants summary judgment to Farmers on this issue.
>
> ...
>
> [W]e'll plan on signing it in a week unless . . . there's a meaningful amendment that would change it with regard to . . . somebody else.

RP at 37-39.

A week later, Ms. Panag's counsel failed to offer a substitute plaintiff and requested yet additional time to search for "more suitable plaintiffs [who] were willing to join the suit," as well as

additional discovery from Farmers and CCS. *See* CP 18. Farmers opposed this motion. *See* CP 283-329, 330-336. On July 1, 2005, the trial court signed Farmers' proposed order granting its motion for summary judgment (joined by CCS) to dismiss Ms. Panag's CPA claim with prejudice. *See* CP 829-831. Paradoxically, although the trial court dismissed Ms. Panag's last remaining claim with prejudice in the first two pages of that order, it granted Ms. Panag's counsel's motion for additional discovery and deferral of the entry of final judgment. In relevant part, the trial court ordered Farmers and CCS to:

> 2) provide plaintiff's counsel with a list of all persons who, since May 18, 2000, were sent notices substantially similar to the November 10, 2003 collection notice sent to plaintiff in this matter and which were contested or objected to. Farmers or CCS shall also include with this list all contact information it possesses for each such person listed, and indicate with respect to each whether that person submitted any money or consideration of any sort to either CCS or Farmers. These notices are only for subrogation of auto insurance claims, not other collections by CCS/Farmers.
>
> 3) Following receipt of the lists, Plaintiff's counsel may contact, in writing, all or any one or more of the persons on the list provided by CCS and/or the list provided by Farmers, in order to advise such persons

> of the pendancy of this action, and thereafter to determine whether any one or more such persons are interested in joining this action as an additional party plaintiff and potential representative of the putative class.
>
> 4) No later than 30 days after both lists, with contact information, have been provided to plaintiff's counsel, plaintiff may file a motion seeking to amended the complaint to add additional party plaintiff(s).
>
> 5) The Court will defer entering an order dismissing this action until September 1, 2005 or another date set by the parties.

CP 831.

CCS filed a notice of appeal and an Emergency Motion to Stay Discovery. CP 384-407. Farmers joined in CCS's motion to stay discovery and filed a notice of appeal from the July 1, 2005 Order. CP 408-416. Ms. Panag filed a Motion for Discretionary Review from the same order. CP 43-51. These motions presented an initial procedural issue – whether the trial court's July 1, 2005 three-page order granting Farmers' motion for summary judgment on Ms. Panag's last remaining claim was the equivalent of a final judgment that determined the action and therefore was appealable as a matter of right. After briefing and oral argument, the

Commissioner agreed with Farmers and CCS that the July 1, 2005 order was appealable as a final judgment. Ms. Panag did not challenge the Commissioner's ruling.

The Court of Appeals issued a briefing schedule which now governs this appeal.

IV. ARGUMENT

A. CPA Must Be Read Consistently with the FDCPA

Although the trial court ultimately correctly recognized that Ms. Panag suffered no legally cognizable injury sufficient to maintain any claim, it erred in failing to dismiss her complaint at an earlier juncture for failure to state a CPA claim at all. As a matter of law, the "unfair or deceptive" element of a CPA claim complaining about an alleged collection activity cannot be interpreted to impose a more stringent standard than the identical element under the FDCPA, the comprehensive federal statute that regulates collection activities. By failing to address this purely legal issue upfront, on Farmers' motion to dismiss under CR 12(b)(6) – and by entertaining plaintiff's unsupported argument that the terms "debt" and "due" have a unique meaning under the CPA – the trial court created the

potential for the CPA to be read inconsistently with, and used as an end-run around, the specific federal and state statutes that regulate collection activities.

A Rule 12(b)(6) motion should be granted when it appears beyond doubt that the plaintiff can prove no set of facts to support her claim. *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977) ("Where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper."). Although on a motion to dismiss plaintiff's factual allegations must be taken as true, *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 648, 94 P.2d 901 (2000), legal issues presented by the Complaint need not be taken as true and "are subject to full judicial analysis," *Ironworkers Dist. Council v. Woodland Park Zoo Planning & Dev.*, 87 Wn. App. 676, 684 n.1, 942 P.2d 1054 (1997).

1. FDCPA's Definition of "Debt Collectors" Excludes Creditors

In 1977, Congress amended the Consumer Credit Protection Act, 15 U.S.C. §1601 *et seq.*, by the adding a new Title VIII, the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* The FDCPA

creates statutory private causes of action by consumers against "debt collectors." 15 U.S.C. §1692k(a). The definition of a debt collector is set forth in 15 U.S.C. §1692a(6), which reads:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who repeatedly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. (Emphasis added).

Courts uniformly hold that "[this] statutory term does not encompass the normal efforts of a creditor engaging in efforts to collect *its own* accounts receivable or other amounts due to it." *Vasquez v. Allstate Ins. Co.*, 937 F. Supp. 773 (N.D. Ill. 1996) (emphasis in the original). *See also James v. Ford Motor Credit Co.*, 842 F. Supp. 1202, 1207 (D. Minn. 1994) ("as a general rule actual creditors . . . are not subject to the act") (citation and internal quotation marks omitted) ("creditors, such as Ford Credit . . . are not generally subject to the FDCPA"); *Friedman v. May Dep't. Stores Co.*, 990 F. Supp. 571, 574-75 (N.D. Ill. 1998) ("[l]iability under the Act . . . is possible only if the Defendant is a 'debt collector' as defined under the Act;" a department store that commenced

collection efforts against a customer who was delinquent in paying his store credit card was a creditor exempt from the statute under 15 U.S.C. §1692a(6)); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("the legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors."); *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168 (3rd Cir. 1987) ("Congress' principal reason for enacting the FDCPA was to prevent abuses against these consumers by third-party debt collectors who, unlike creditors, are unrestricted by the desire to protect their good will when collecting past due accounts.").

As in *Vasquez,* Farmers "indemnified its insured . . . and pursuant to its right of subrogation under its contract with [its insured] . . . demanded payment from [the plaintiff] in the amount of the indemnification provided to its insured." *Vasquez*, 937 F. Supp. at 775.[1] This makes Farmers plaintiff's creditor but not her debt collector because collection of debts "is surely not the 'principal

[1] Ms. Panag's Amended Complaint stated that "Farmers provided automobile insurance coverage to the other vehicle involved [in Ms. Panag's accident] (the 'Hamilton vehicle') . . . [and paid] for the damage sustained by and/or repairs made to the Hamilton vehicle." CP 3 ¶¶ 10-12.

purpose'" of Farmers' business. *Id.* at 774 (citing 15 U.S.C. §1692a(6)). Because "a 'debt collector' is the ***only*** category of parties whose conduct is regulated by Act . . . and against whom Act §1692k provides a private right of action," Farmers cannot be sued by a person claiming to be "damaged by reason of any violation of the statutory provisions." *Id.* This result does not change when, as here, the creditor engages a collection company to assist in debt collection. *See Vasquez*, 937 F. Supp. at 775 (the collection letter was sent by Universal Fidelity Corporation, Allstate's co-defendant).[2]

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[2] Washington Legislature has passed the Collection Agency Act, RCW 19.16.110-240, ("CAA"), that provides consumers more extensive rights than the FDCPA. The CAA provides for private actions by making certain violations of the CAA per se violations of the CPA. RCW 19.16.440. However, with respect to the definition of "collection agencies," the CAA is consistent with the FDCPA:

> "Collection Agency" does not mean and does not include . . .
>
> Any person whose collection activities are carried in his, her or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: Trust companies; savings and loan associations . . . lawyers; insurance companies; credit unions; loan and finance companies; mortgage banks; and banks. RCW 19.16.100(3)(c).

2. FDCPA's Definition of "Debt" Includes Obligations Alleged to Be Owed

The FDCPA defines the term "debt" as an "obligation" or an "***alleged obligation***." 15 U.S.C. § 1692a(5). *See Newman v. Boehm, Pearlstein and Bright, Ltd.*, 119 F.3d 477, 480 (7th Cir. 1997) (FDCPA's definition of "debt" requires no more than a "transaction creating an obligation to pay"); *Shula v. Lawent*, 359 F.3d 489 (7th Cir. 2004) (alleged obligation to pay court costs after debtor paid principal debt was a "debt" within the meaning of FDCPA); *Schroyer v. Frankel*, 197 F.3d 1170 (6th Cir. 1999) (the FDCPA concept of "debt" has nothing to do with whether the underlying debt is valid but is concerned only with the method of collection).

An obligation or an alleged obligation is a "debt" under the FDCPA ***even when the timing or amount of payments is not yet determined***. *Newman*, 119 F.3d at 481 (past-due condominium assessments are a "debt" "regardless of whether the assessment or the service comes first").

The FDCPA forbids any "false, deceptive or misleading representation or means used in the attempt to collect a debt" and

"the false representation of . . . the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). As a matter of law, because "debt" includes ***alleged obligations*** to pay,[3] FDCPA's prohibition of false, deceptive or misleading representations is not violated when the debtor disputes his or her duty to pay. *See Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000) (attempt to collect a time-barred debt is not deceptive as a matter of law because "the statute of limitations foreclosed judicial remedies rather than eliminating the underlying rights"); *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) ("[w]e . . . hold that, in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid."); *Bleich v. Revenue Maximization Group, Inc.*, 233 F. Supp. 2d 496, 498, 500 (E.D.N.Y. 2002) ("[t]he court . . . holds that the [consumer's] allegation that the debt sought to be collected is not owed, standing alone, cannot form a basis for a 'false and misleading

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[3] *See also* RCW 19.16.100(2)(a) (collection agency includes persons attempting to collect claims ***asserted to be owed***).

practices claim' under the FDCPA;" therefore, collection letters referring to consumer's "failure to pay the amount due" and stating that "amount due is now seriously in arrears" were not actionable); *Kramsky v. Trans-Continental Credit & Collection Corp.*, 166 F. Supp. 2d 908, 910, 912 (S.D.N.Y. 2001) (collection agency's letter stated, "This past due statement reflects a balance due the above stated creditor. This account has been referred to collection and we must ask that you remit the balance shown in full using the enclosed envelope;" the court held that "if this letter were deemed to violate the FDCPA, no debt collector could ever demand payment of a lawful debt. This Court cannot and will not read the FDCPA to require so absurd a result").

Notably, in none of these cases were the "debts" or "amounts due" referenced in the letters reduced to judgments. The FDCPA imposes no such requirement. *See* 15 U.S.C. §1692g(a)(4) (if the debtor disputes the debt, the debt collector must "obtain verification of the debt ***or*** a copy of a judgment against the consumer" and mail it to the consumer) (emphasis added). The disjunctive "or" can only

mean that there is no requirement that a "debt" be reduced to a judgment in order to be collectible:

> Section 1692g(a)(4)'s use of the disjunctive "or" between "verification of the debt" and "copy of the judgment" leads to the conclusion that the debt collector is free to choose the appropriate form of verification. If a judgment exists, the debt collector should promise to provide it. If a judgment does not exist, the debt collector must promise to provide alternative verification of the debt.

Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F. Supp. 405, 410 (N.D.N.Y. 1995). *See also Stojanovski v. Strobl and Manoogian, P.C.*, 783 F. Supp. 319, 324 (E.D. Mich. 1992) (rejecting plaintiff's argument that the FDCPA "absolutely required that Defendant . . . provide a copy of the judgment, . . . taking the most charitable view of [this] argument, it was misguided").

The cases decided under the FDCPA hold that "absent notification from the consumer that she disputes the debt, the debt collector may continue its collection activities" with respect to the alleged debt without running afoul of the statute. *See Spira v. Ashwood Financial, Inc.*, 358 F. Supp. 2d 150, 158 (E.D.N.Y. 2005); *see also* 15 U.S.C. §1692g(a)(2) (a validation notice sent under the

FDCPA must include the amount of the debt, the name of the creditor, and a statement that, unless the debtor disputes the validity of the debt "the debt will be assumed to be valid by the debt collector."). ***In sum, neither the absence of a judgment nor the presence of a dispute about the validity of the alleged obligation to pay make such obligation less of a "debt" under FDCPA.***

Similarly, there is nothing unfair, deceptive or misleading in referring to the alleged debt as "due." Unlike the term "debt," the term "due" is not specifically defined in the FDCPA. Its dictionary meaning is includes amounts "owing as a debt:"

> **Due 1.** Payable immediately or on demand. **2.** Owed as a debt, owing. **3.** In accord with right, convention, or courtesy; appropriate. **4.** Meeting special requirements; sufficient; *due cause*. **5.** Expected or scheduled, esp. appointed to arrive. **6.a.** Anticipated; looked for. **b.** Expecting or ready for something as part of a normal course or sequence.

The *American Heritage College Dictionary* (3d Ed).

Thus, the term "due" simply describes the status of a "debt" as "owing;" because the "debt" need not be reduced to a judgment, an alleged debt can still be "due." As the Seventh Circuit Court of

Appeals explained, rejecting the argument that a statement that a portion of a debt is "Now Due" is a violation of §1692g:

> The phrase "Now Due," even to an unsophisticated consumer, simply means that the debt collector is willing to accept less than the total balance of the debt to bring the account to a current status. The consumer has the option of paying the amount due, paying the total balance, or doing neither and contesting the debt. These options do not contradict one another.
>
> . . .
>
> We conclude that an unsophisticated consumer, able to make basic logical deductions and inferences and to not interpret collection letters in a bizarre or idiosyncratic fashion, would understand that the amount of the debt is the "Balance" and that the amount "Now Due" is the portion of the balance that the creditor will accept for the time being until the next bill arrives.

Olson v. Risk Management Alternatives, Inc., 366 F.3d 509, 512-13 (7th Cir. 2004) (internal quotation marks and citations omitted). *See also Wade v. Regional Credit Assn*, 87 F.3d 1098, 1099, 1100 (9th Cir. 1996) (the notice stating that the creditor's records showed "this amount owing" did not constitute false, deceptive, or misleading means of collecting debts; "the notice told [the debtor] correctly that she had an unpaid debt, and properly informed her that failure to pay might adversely affect her credit reputation") (dismissing both state

CPA and FDCPA claims); *Ferguson v. Credit Management Control, Inc.*, 140 F. Supp. 2d 1293, 1303 (M.D. Fla. 2001) (the collection notice urging the debtor to pay "this debt amount" was not actionable; "there is nothing in the letter designed to mislead or deceive even the least sophisticated consumer").

Again, to summarize, a collection notice that states the "amount due" does not violate the FDCPA's prohibition on false, deceptive, or misleading debt collection practices. To the contrary, "the sine qua non of a statute-compliant dunning letter is its ***inclusion*** of a specific amount that constitutes the consumer's present debt." *Zaborac v. Philips and Cohen Associates, Ltd.*, 330 F. Supp. 2d 962, 968 (N.D. Ill. 2004) (emphasis added).

In the present action, Ms. Panag makes the same arguments – that no "debt" can exist until it is reduced to judgment and that the phrase "amount due" is misleading – under the CPA. But she offers no authority to support her contention that CPA's prohibition of "unfair or deceptive" practices is different in scope from similar prohibitions in the FDCPA. In fact, the Washington Legislature explicitly recognized that in enacting the CPA it was not writing on

a clean slate but was informed by the federal statutes and decisional law addressing similar issues:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. **It is the intent of the legislature than in construing this act, the courts be guided by final decisions of the federal courts.**

RCW 19.86.920 (2005) (emphasis added).

Federal courts have rejected each of the arguments Ms. Panag tries to make under the CPA as "misguided" even from the vantage point of the least sophisticated of consumers. As a matter of law, a "debt" includes alleged obligations, including disputed ones, and obligations not reduced to judgment. A "debt" is "due" whenever an alleged obligation is owing.

The "FDCPA was not intended to shield . . . consumers from the embarrassment and inconvenience which are the natural consequences of debt collection." *Ferguson*, 140 F. Supp. 2d at 1297. Neither was it intended to be violated by "ingenuous

misreading"[4] or by "bizarre" or "idiosyncratic"[5] interpretation of commonly used terms such as "debt" or "amount due." Neither was the CPA. *See* RCW 19.86.920.

3. An Alleged Debt Need Not Be Liquidated

Ms. Panag's final argument – that no "debt" can be "due" unless it is liquidated – is another example that even elementary legal concepts are not immune from ingenuous misreading. The terms "liquidated" and "unliquidated" refer to a claim's value and the ease with which that value can be ascertained. *In re Mazzeo*, 131 F.3d 295, 304 (2d Cir. 1997). If the value of the claim is easily ascertainable by reference to an agreement or by a formula, it is referred to as liquidated. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 44 P.2d 621 (1968) (a liquidated claim is one "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.") (citation and quotation omitted). If the value depends instead on a future exercise of discretion, not restricted by specific

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[4] *White v. Goodman*, 200 F.3d 1016, 1020 (7th Cir. 2000) ("[t]he Act is not violated by a dunning letter that is susceptible of an ingenuous misreading, for then every dunning letter would violate it.").

[5] *Olson*, 366 F.3d at 512-13.

criteria or formula, the claim is unliquidated. *Danlel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997) ("if the factfinder must exercise discretion to determine the amount of damages, the claim is unliquidated.") A claim "plainly is liquidated if its amount is made certain by operation of law." *In re Mazzeo*, 131 F.3d at 304 (citation omitted).

The overwhelming body of precedent is that the existence of a dispute does not render a claim unliquidated. *Id.* at 304-05 ("most courts have concluded that disputed debts are included in the calculation of the amount of debt . . . The vast majority of courts have held that the existence of a dispute over either the underlying liability or the amount of the debt does not automatically render the debt either contingent or unliquidated.")

In other words, the "***concept of a liquidated debt relates to the amount of liability, not the existence of liability.***" *United States v. Verdunn,* 89 F.3d 799, 802 (11th Cir. 1996) (emphasis added). A "debt" can be owed whether or not it is liquidated. The only difference is that liquidated claims are subject to an award of

prejudgment interest, while unliquidated debts are not. *Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 98 P.3d 116, 446 (2004) ("prejudgment interest is allowed only on liquidated claims.") (citation omitted).

Nothing in the FDCPA (or the CPA) requires a credit collector to obtain a judicial determination that the alleged debt is liquidated ***before*** seeking to collect it. (As discussed above, Congress specifically contemplated that collection efforts are not limited to claims that have been reduced to judgment). *See Fields v. Wilber Law Firm*, 383 F.3d 562, 564 (7th Cir. 2004) ("barring a stipulation to a specific liquidated amount in the original debtor-creditor contract, [plaintiff] proposes debt collectors should be required to seek court approval for a specific amount of attorneys' fees before including them in the account balance. Essentially, [plaintiff] asks us to endorse an approach that would require every debt collector under FDCPA to go to court every time it sought to [collect]. . . . Plainly stated, the statute does not require such an extraordinary result.").

Neither does common law or common sense:

> We cannot view a debt as contingent merely because the debtor disputes the claim. . . . Although the creditor's ability to collect the sum due him may depend on adjudication, that does not make the debt itself contingent. In broad terms, the concept of contingency involves the nature or origin of liability. More precisely, it relates to the time or circumstances under which the liability arises. In this connection liability does not mean the same as judgment or remedy, but only a condition of being obligated to answer for a claim.

Mazzeo, 131 F.3d at 303 (citation omitted).

Ms. Panag's debt to Farmers arose from the auto accident on 2003, when, while driving without insurance, she caused damage to the car driven by Hamilton, Farmers' insured. She disputes neither the fact of the accident nor the assessment of her fault. The attempt to collect the subrogated debt due from Ms. Panag to her creditor does not require the court permission or pre-approval of the amount due and is neither "unfair" nor "deceptive" under the CPA.

"In matters relating to the conduct of insurance business courts . . . should defer to the Legislature in the exercise of its police power to accomplish the regulation of unfair or deceptive economic practices." *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 430, 799 P.2d 235 (1990). *See also Leingang v. Pierce County*

Medical Bureau, Inc., 131 Wn.2d 133, 154, 930 P.2d 288 (1997) (absent a clear communication from the Insurance Commissioner that a particular practice is disapproved, a private plaintiff cannot maintain a CPA action alleging that such practice is either "unfair" or "deceptive").

Here, both Congress and the Washington legislature have spoken. Neither the federal nor the state statutes regulating collection activities permit the ingenuous misreading of the terms "debt" or "amount due" by the debtor. The Court should reject Ms. Panag's attempt to misread the CPA in a similar fashion. *See Cazzanigi v. General Elect. Credit Corp.*, 132 Wn.2d 433, 449, 938 P.2d 819 (1997) ("public policy is to be declared by the legislature, not the courts;" where the legislature declines to create a private cause of action, Washington courts "will not imply a contrary intent"). Her CPA claim should have been dismissed under CR 12(b)(6).

B. The Court Lacked Jurisdiction To Order Discovery After Dismissal of Plaintiff's Remaining CPA Claim

At oral argument on Farmers' Motion for Summary Judgment, the trial court dismissed Ms. Panag's CPA claim for failure to offer any evidence of cognizable injury. *See* RP at 37-38. Despite dismissal of Ms. Panag's last remaining claim, the trial court deferred entry of judgment by one week to permit Ms. Panag's counsel to find a substitute plaintiff. RP at 38-39. Unable to locate anyone with cognizable injury, Ms. Panag's counsel requested even more time and further discovery from the defendants. RP at 38. Over Farmers' and CCS's objections,[6] the trial court granted counsel's request. CP 829-831.

After Ms. Panag's last remaining claim was dismissed and the entire justiciable controversy before the trial court was resolved, there was no recognized legal basis for such relief. *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960 (2000) (a "justiciable controversy," over which State court may exercise jurisdiction, is one involving (1) an actual, present and existing

[6] CP 330-336; 823-828.

dispute (2) between parties having genuine and opposing interest, (3) which involve interests that must be direct and substantial; rather than abstract, and (4) judicial determination of which will be final and conclusive).

After rejecting Ms. Panag's last remaining claim as a matter of law, the trial court simply lacked jurisdiction to take any action – let alone order defendants to produce discovery so that plaintiff's counsel could troll for a new client. *See United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990) ("because the underlying controversy [is] no longer alive, 'the court simply lack[s] power to impose any new, affirmative requirements on the parties relating to discovery'") (quoting *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (1st Cir. 1988)); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1133 (9th Cir. 2003) (same); *In Re CIS Corp.,* 123 B.R. 488, 490 (1991) (after the court resolves all pending claims among the litigants, it lacks jurisdiction to allow plaintiff's counsel to pursue discovery from defendants); *Sherry v. Illinois*, 55 Ill. Ct. Cl. 437, 2002 WL 32705315, at *3 (Ill. Ct. Cl.

2002) ("there is no claim pending here in which to allow discovery against those officials or anyone else").

If the "do over" sought by Ms. Panag's counsel were authorized, lawyers would initiate lawsuits before they had clients and subject defendants to discovery in the hope that "something will turn up" later. *Cf. Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996) ("it is not enough simply to assert, à la Wilkins Micawber, that 'something will turn up.'"). Absent cognizable injury, Ms. Panag's request for discovery was simply irrelevant. *See Dura Pharmaceuticals, Inc. v. Broudo,* __ U.S. __, 125 S. Ct. 1627 (2005) (without cognizable injury, a claim "is not actionable"). *See also Prosser & Keeton on Law of Torts* § 110, at 765 (5th Ed. 1984) (plaintiff "must have suffered substantial damage" before "the cause of action can arise"); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 683-84 (7th Cir. 1990) ("No hurt, no tort").

Courts are not in the business of resolving abstract disagreements absent a live controversy and a *bona fide* cause of action between a specific plaintiff and a defendant. *See Cena v.*

Dept. of Labor and Industries, 121 Wn. App. 915, 924, 91 P.3d 903 (2004) ("this court avoids . . . rendering advisory opinions where there is no justiciable controversy"). Attorneys in search of a client are not parties and should not be allowed discovery rights on their own after their client's case has been dismissed as a matter of law for failure to prove injury.

That Ms. Panag purported to represent a class does not change this result. "A class action, when filed, includes only the claims of the named plaintiff or plaintiffs. The claims of unnamed class members are added to the action later, when the action is certified as a class. There thus cannot be 'original jurisdiction' . . . over the claims of unnamed class members." *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001). *See also Hudgins Moving & Storage Co. v. American Express Co.*, 292 F. Supp. 2d 991, 1000 (M.D. Tenn. 2003) ("a complaint bringing claims on behalf of a proposed class is not a class action when filed; rather, until the class is certified, it brings only the named plaintiff's claims before the court.") (citing *Gibson*).

This case was never certified as a class action – in fact, Ms. Panag had never moved for certification. *See Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1015 (D. Neb. 2000) ("no class was ever certified and this is not a class action"). Thus, the only claims before the Superior Court were Ms. Panag's. All of her claims were dismissed. By entering the order dismissing Ms. Panag's last (CPA) claim for lack of injury, the trial court fulfilled its role and resolved all live claims between the parties. Its decision to defer entry of final judgment and compel additional discovery from Defendants was erroneous and should be reversed.

V. CONCLUSION

Ms. Panag's ingenuous misreading of the terms "debt" or "amount due" does not create a cause of action under the CPA. The trial court's erroneous failure to dismiss Ms. Panag's claim under CR 12(b)(6) should be reversed. The trial court compounded this error by deferring entry of summary judgment dismissing Ms. Panag's claim and compelling defendants to produce discovery when no justiciable controversy existed, and should be reversed.

RESPECTFULLY SUBMITTED this 18th day of November, 2005.

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DECLARATION OF SERVICE

I, Juli Waldschmidt hereby declare that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the State of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101.

On November 18, 2005, I caused to be filed with the Court of Appeals of the State of Washington, Division I, ***Farmers Insurance Company's Opening Brief***. I also served copies of said document on the following parties as indicated below: